United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4140

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LEYDA A. FILPO GENAO DE PEREZ, Petitioner,	:	
- v -	:	Docket No.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent,	:	75 - 4140

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

STATEMENT OF THE ISSUES

I. When an immigrant visa applicant pays a fee to a Consular Officer of the State Department of the United States, is the applicant entitled to Due Process?

II. Is the presumption of regularity sufficient to satisfy the clear and convincing burden the Immigration Service must meet in a deportation hearing where Petitioner's unrebutted testimony is on the record and there is lacking in the Government's record, evidence of a required warning?

III. Is the Immigration and Naturalization Service

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III. Is the Immigration and Naturalization Service

subject to Equitable Estoppel where there has been a denial of due process?

IV. Are the undisputed facts in this case sufficient to work an equitable estoppel against the Immigration and Naturalization Service?

STATEMENT OF THE CASE

This is a Petition for Review of a Deportation Order by the Immigration and Naturalization Service (R.15a).

On November 7, 1973, Petitioner was found deportable by an Immigration Judge and was granted the privilege of voluntary departure (R.5a-11a). On appeal to the Board of Immigration Appeals, the order was affirmed. The decision is unreported.

The Government alleged that the petitioner was subject to deportation pursuant to the following provision of law:

> "Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are seeking to enter for the purpose of performing skilled or unskilled labor and in whose cases the Secretary of Labor has not made the certification as provided by Section 212(a)(14) of the Act, as amended."

This charge was based on the following facts alleged by the Immigration and Naturalization Service and developed at a hearing on October 16, 1973 (R. 1a-2a).

1. You are not a citizen or national of the United States;

2. You are a native of Dominican Republic and a citizen of the Dominican Republic;

3. You entered the United States at New York, New York on or about January 5, 1968;

4. You were then admitted for permanent residence on presentation of an immigrant visa issued to you on December 20, 1967 by the American Consul, Santo Domingo, Dominican Republic;

5. You claimed exemption from the required labor certification as the unmarried child of a lawful permanent resident of the United States;

6. You were married to Rigoberto Perez on January 2, 1968 at Santiago, Dominican Republic;

7. At the time of your admission to the United States you were not in possession of a valid labor certification as required under the provisions of Section 212(a)(14) of the Immigration and Nationality Act and you were not exempt from that requirement.

At the hearing, Petitioner denied that she was deportable on the charge alleged, but admitted to the facts charged. Her answer to the charge was that the

Immigration and Naturalization Service should be estopped from deporting her.

An appeal was taken to the Board of Immigration Appeals. The appeal was denied, dated May 27, 1975 (R.12a-15a). This petition for review was brought July 11, 1975 (R. 15a),

In addition to those facts alleged by the Government, petitioner at the deportation hearing testified to the following events at the time she obtained an immigrant visa from the American Consul in the Dominican Republic. The substance of this testimony which remains uncontradicted and which facts are not in dispute by the Government was, that, at the time the Consul issued petitioner a visa in the Dominican Republic, the Consul did not inform petitioner of the immigration consequences of marriage prior to entry. In addition, no Statement of Marriageable Age Applicant (Form FS-548) was taken by the Consul and none was signed (R.3a-5a). The Immigration Service has no record of such a statement having been signed. Under the regulations of the State Department, the Consul was required to give petitioner such warnings through the aforementioned procedure.

On administrative appeal, these facts were held by the Board of Immigration Appeals not to constitute facts that would give rise to equitable estoppel against the Immigration and Naturalization Service (R.12a-15a).

ARGUMENT

POINT I. When an immigrant visa applicant pays a fee to a Consular Officer of the State Department of the United States, is the applicant entitled to Due Process?

The Consular Officer should be required by constitutional due process to at least comply with applicable regulations of the Agency governing his conduct and extend its benefit to an immigrant applicant, who has been charged a fee for a visa interview. In addition, these same requirements should be mandated where the Consul approves the applicant and issues a visa for an additional fee.

State Department Form FS-548 Statement of Marriageable Age Applicant is required to be completed and signed in duplicate by the alien when appearing for his visa interview(Addendum). At this time, the alien applicant pays a fee of $5 to be processed by the Consular Officer. If found eligible a fee of $20 is prescribed for the issuance of an immigrant visa. That fee is collected after the execution of the application and completion of the visa interview...22 C.F.R. 42.121.

The regulation which serves as the basis for issuing Form FS-548 appears as follows in 22 C.F.R. Section 42.122(d).

> "(d) The period of validity of a visa issued to an immigrant as a child shall not extend beyond the day immediately preceding the date on which the alien becomes 21 years of age. The consular officer shall warn an alien, when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission or if he fails to apply for admission at a port of entry into the United States before reaching the age of 21 years. The consular officer shall also warn an alien issued a visa as a first or second preference immigrant as an unmarried son or daughter of a citizen or lawful permanent resident of the United States that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission into the United States."

22 C.F.R. Section 42.124(b): Entitled Procedure in Issuing Visas and Section 42.111(b)(5): Entitled Supporting Documents, when read together with 22 C.F.R. Section 42.122(d) as well as the history of visa - issuing procedure by Consuls throughout the foreign Service, indicates that FS-548 is part and parcel of the actual visa and is required by law to be attached to the visa itself. In short, that the Consul is under

regulation, charged with this positive duty, for the benefit of the intending immigrant, to have the alien sign a marital declaration that serves to protect the alien from committing what would otherwise be, the innocent act of getting married prior to his entry into the United States. To not otherwise extend protection in the form of requiring consuls to at least adhere to their own regulations, 22 C.F.R. 42.115(c) is to reduce the law to a meaningless form, and cause damage to an alien who must also be considered a person for purposes of Amendment Five of the United States Constitution Due Process Clause.

POINT II. The Presumption of Regularity is not conclusive and should not serve to satisfy the clear and convincing burden of evidence the Government must meet in a deportation hearing. To do otherwise, is to constitute a denial of due process.

At the hearing petitioner testified to not receiving any such warning or statement to be signed. Petitioner's sworn statement was not rebutted (R.3a-5a). The administrative judge rejected the evidence and found for the Service basing his decision on the presumption of regularity in connection with the issuance of respondent's

visa (R.5a-11a). This presumption was substituted for evidence, the absence of a signed FS-548 warning form in the record, notwithstanding. At the very least, the burden should have been shifted back to the Government.

Petitioner contends that his procedure is constitutionally intolerable, because no other evidence can possibly exist, except testimony of the petitioner given at the deportation hearing, as well as the absence of a record of warning otherwise required by regulation, both of which are present in this case. The clear and convincing burden the Government must meet in the deportation seeting cannot rest exclusively on the presumption of regularity where there has been an unanswered rebuttal. To do otherwise is to bootstrap the Government past estoppel.

Alternatively, this Court should find an abuse of discretion on the finding of deportability where, as here, the Service cannot rebut the testimony and there exists an absence of a record with respect to the required warning to be issued. The device of a presumption of a regularity is hardly consonant with the clear and convincing rule set out by the Supreme Court Woodby v. INS, 385 U.S. 276, 87 S.Ct. 483(1956) and the due process

clause of the United States applicable to resident aliens. Han Lee Mao v. Brownell, 207 F.2d 142, (D.C.Cir.1953). U.S. Ex rel. Marcello v. Ahrens, 113 F. Supp. 22 (D.C. La. 1953), Affirmed 212 F.2d 830, Affirmed 75 S.Ct. 757, 349 U.S. 302.

The just application of the constitution and the regulations in issue are the gist of this petition for review. An alien who seeks to "avail himself of such provisions of law concerning a matter so vital that his very life and liberty may depend on its just application, is entitled to thorough protection of the (Fifth) Amendment," of the United States Constitution Watts v. Shaughnessy, 107 F. Supp. 613 (D.C.N.Y. 1952).

POINT III. The estoppel doctrine is applicable to the Immigrationand Naturalization Service where justice and fair play require it.

In Tejeda v. United States Immigration and Naturalization Service, 346 F.2d 389(9th Cir. 1965), the conduct of the American Consul was deemed material to the issues in a deportation hearing conducted by the Immigration and Naturalization Service. The court remanded the

case for further findings to determine if any facts developed could be shown that would indicate that the American Consul had misled Tejeda.

The Court said,

> "To hold to the contrary if this is in fact what transpired and deny any form of relief from the order of deportation, would result in the punishment of a poorly-educated alien for his reliance on the advice of a presumptively well-informed Official of the United States Government. This we deem improper," at 393.

Later the Tejeda Court, at page 394, said"... If the properly developed factual findings reveal that petitioner made a bona fide effort to reenter in 1947 or 1948 and failed to obtain reentry due to the misadvice of the American Consul, the respondents should be precluded from denying petitioner what was rightly his - reentry as a non quota immigrant in 1947 or 1948 under 22 U.S.C. §1281."

The Tejeda Court based its reasoning on Moses v. United States, 341 U.S. 41, 71 S. Ct. 553, 96 L.Ed. 729 (1951), and Mcleod v. Peterson, 283 F.2d 180(1960).

In Brandt v. Hickel, 427 F.2d 53(9th Civ.1970), the Court found that the Secretary of Interior could be collaterally estopped from disavowing a misstatement an employee had made. Over the objection of the respondent the Court, at page 57 said "...the Secretary was understandably concerned that the estoppel doctrine can have

a deleterious effect on administrative regularity. However, administrative regularity must sometimes yield to basic notions of fairness."

In United States v. Lazy FCRanch, 481 F.2d 985 (9th Cir. 1973), the Court said, "We think the estoppel doctrine is applicable to the United States where justice and fair play require it" at page 988. The Court applied estoppel against the Department of Agriculture.

In Dana Corporation v. United States, 470 F.2d 1032 (Ct. of Claims 1972), estoppel against the Post Office Department was upheld where the form of conduct sought to be the basis of an estoppel was an absence of notice or information by an employee as to a contractual problem, but yet who continued payment to the plaintiff.

In Gestuvo v. District Director of the United States Immigration and Naturalization Service, 337 F.Supp 1093 (D.C. Calif. 1971), the Immigration and Naturalization Service of the Department of Justice was held estopped from refusing to revalidate a third preference classification which was a condition precedent for petitioner to obtain an immigrant visa.

The Gestuvo Court, at page 1100 said, "...this area of the law is not beyond consideration of morals and Justice." The Court continued,

> "...'the requirements of morals and justice' demand that our administrative agencies be accountable for their mistakes. Detrimental reliance on their misrepresentations or mere unconscientiousness should create an estoppel, at least in cases where no serious damage to national policy would result. As the Court of Appeals recognized in Georgia-Pacific,' it is hardly in the public's interest for the government to deal dishonestly or in an unconscientious manner." 421 F. 2d at 100. These principles, moreover, apply as much to the Immigration and Naturalization Service as to any other of our administrative agencies, and it should not be immune from estoppel. The contrary conclusion would sacrifice to form too much of the American spirit of fair play in both our judicial and administrative processes." Jay v. Boyd, 351 U.S. 345, 361, 76 S.Ct. 919,929, 100 L.Ed. 1242(1956) (Warren, C.J. dissenting). It would also contradict Georgia-Pacific, Brandt, and the above-cited immigration and citizenship cases, at page 1101."

In Hetzer v. Immigration & Naturalization Service, 420 F. 2d 357(9th Cir. 1970), the court again, held for petitioner, on review from the Board of Immigration Appeals. The Court reversed and remanded, for the Service to consider whether a Service Office had assumed an obligation to inform petitioner of his possible eligibility for immigrant status, at page 361.

Thus, it is readily seen that the Immigration and Naturalization Service is subject to the doctrine of equitable estoppel in appropriate circumstances.

POINT IV. Where an American Consul is under a possitive duty to inform and warn an alien applicant of the condition subsequent of marriage which may invalidate his visa if the condition occurs prior to entry into the United States, the Immigration Service should be estopped from relying on the occurrence of this condition in the interests of morals and justice, as an act of affirmative misconduct.

"The claim of the Government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice", Berger, Estoppel against the Government 21 Chi. L.Rev., 680, 707(1954) cited in Gestuvo v. District Director of the United States Immigration and Naturalization Service (See Supra) at page 1098.

The elements necessary for estoppel have traditionally centered upon justified detrimental reliance and a duty to inform or warn, by the party sought to be estopped. Here, there is no question as to the duty of the Consular Office. The State Department regulations specifically spelled out for the Consul exactly the procedure.

Marriage or lack of it has always been the most critical element in the extension of this nations' immigration benefits. In this case, contrary to most situations under our laws, the status of remaining unmarried was crucial to the petitioner's right to immigrate to the United States.

However, this problem was not a new one for the State Department. They were well aware that this dual tier system of entry into the United States contained many pitfalls for immigrating aliens. Not only, as is the case here, was she required to be eligible at the time she received a visa, but in addition, she was required to maintain this status until reaching the shores of the United States and making her entry. At this point only, would she be free to marry, that is, after surrendering her visa to the immigrant inspector at her intending port of entry.

For the events that transpired in this case, the regulations were specifically enacted by the State Department (Point I Supra).

It was the specific positive duty of the consular officer to execute this duty. This he did not do. It must

be presumed that the consular officer understood the applicable regulation and knew that the warning was applicable in petitioner's case.

Petitioner for his part was, of course, unschooled and unaware of the dual tier admission requirements. When the Consular Officer approved issuance of the visa to the petitioner, the Consul acted as the agency of the United States Government charged with administering the immigration laws. Petitioner cannot be held to have unreasonably or unjustifiably relied on an authoritative and seemingly final determination of her eligibility that was based on her status at that time.

Petitioner could not know and cannot now be held to have known these consequences of deportation, if a written warning or an authorized and required State Department form was not signed by petitioner.

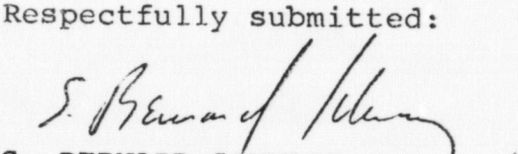
Finally, the detriment of petitioner is obvious. She is subject to deportation at present and in all probability will never be able to return to the United States after residing here for many years.

It is suggested that the national interest lies in a conscientious review by the Consul of the applications that are submitted to him and for which a fee is paid. Where a visa application is made, there should be a positive duty upon an executive officer of the United States to perform his function properly. The non-performance or improper performance should constitute an act of affirmative misconduct.

CONCLUSION

For the foregoing reasons, the petition for review should be granted and the Order of the Board of Immigration Appeals be set aside. Dana Corp. v. United States, (See Supra). Hetzer v. Immigration and Naturalization Service, (See Supra).

Respectfully submitted:



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New York, N.Y.
January 9th, 1976

ADDENDUM

REGULATIONS

22 C.F.R. §§ 42.121 Visa fees.

A fee of $20 is prescribed for the issuance of an immigrant visa. The fee shall be collected after the execution of the application and completion of the visa interview, and a fee receipt shall be issued. A fee collected for the application for or issuance of an immigrant visa is refundable only when the principal officer at a post or the officer in charge of a consular section determines that the visa was issued in error or could not be used as a result of action by the U.S Government over which the alien had no control and for which he was not responsible.

22 C.F.R. § 42.124 Procedure in issuing visas.

(b) Documents comprising visa. Form FS-511 and Form FS-510, when properly executed, together with one copy of each document required by the consular officer in accordance with § 42.111, except those records or documents which are not pertinent to a determination of the applicant's identity, classification or any other matter relating to his eligibility to receive a visa, shall constitute an immigrant visa.

22 C.F.R. §§ 42.111 Supporting documents.***

(b) Documents required. An alien applying for an immigrant visa shall be required to furnish with his application, if obtainable, two copies of a police certificate or certificates; two certified copies of any existing prison record, military record, and record of his birth; and two certified copies of all other records or documents concerning him or his case which the consular officer may deem to be necessary. An alien who has only one certified copy of any of these documents and cannot obtain another may

present two authenticated or photostatic copies of the certified copy, but the certified copy must be offered for inspection by the consular officer who may return it to the alien.

(5) "Other records or documents" shall include any records or documents establishing the applicant's relationship to a spouse or children, if the applicant has a spouse or children, and any records or documents which are pertinent to a determination of the applicant's identity, classification or any other matter relating to his eligibility to receive a visa.

22 C.F.R. §§ 42.122 Validity of visas.

(d) The period of validity of a visa issued to an immigrant as a child shall not extend beyond the day immediately preceding the date on which the alien becomes 21 years of age. The consular officer shall warn an alien, when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission or if he fails to apply for admission at a port of entry into the United States before reaching the age of 21 years. The consular officer shall also warn an alien issued a visa as a first or second preference immigrant as an unmarried son or daughter of a citizen or lawful permanent resident of the United States that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission into the United States.

22 C.F.R. § 42.115 Application forms.

(c) Additional information as part of application. In any case in which the consular officer believes that the information provided in Form FS-510 is inadequate to determine the alien's eligibility to receive an immigrant visa he may require the submission of such additional information as may be necessary or interrogate the alien on any matter which is deemed material. Any additional statements made by the alien shall become a part of the visa application. All documents required under the authority of § 42. 111 shall be considered papers submitted with the alien's application within the meaning of section 221(g)(1) of the Act.

FS-548

DEPARTMENT OF STATE
Foreign Service of the United States of America
STATEMENT OF MARRIAGEABLE AGE APPLICANT
(Issued Visa as Child)

_____
(date)

This form is to be completed and signed in duplicate. Attach original to the immigrant visa issued. The duplicate is to be attached to the consular office file copy of the visa issued.

I,_____ the undersigned, fully understand that I shall lose my special, immediate relative or preference status or right to benefit from the immigrant status of my accompanying parent if I marry prior to my application for admission at a port of entry into the United States and that I would then be subject to exclusion therefrom.

_____
Signature of Applicant

TRADUCCION

DECLARACION PARA LOS SOLICITANTES EN EDAD CASADERA

Yo, _____ el suscrito, entiendo a cabalidad que perderé mi estado legal especial, de pariente inmediato, o de preferencia, o el derecho a beneficiarme del estado legal de inmigrante de mi padre o madre que me acompaña, si contraigo matrimonio antes de solicitar mi admisión en un puerto de entrada de los Estados Unidos y que entonces estaría sujeto a exclusión o eliminación de este beneficio.

_____
Firma del Solicitante

EXHIBIT "A"

Thomas J. Cahill (RI)

2 cs

January 9th 1976